

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL LINDER, an individual,) Case No. 4:14-cv-03861 SC
)
Plaintiff,) ORDER GRANTING DEFENDANTS'
) MOTION TO DISMISS
v.)
)
GOLDEN GATE BRIDGE, HIGHWAY &)
TRANSPORTATION DISTRICT, a)
Special District; LISA LOCATI,)
individually and as Bridge)
Captain of the District, and DOES)
1 to 10,)
)
Defendants.)

I. INTRODUCTION

Now before the Court is Defendants Golden Gate Bridge, Highway & Transportation District and Lisa Locati's (collectively "Defendants" or "the District") motion to dismiss. ECF No. 46 ("MTD"). Plaintiff Paul Linder brings this action against the District for (1) retaliation in violation of California Labor Code Section 1102.5(b), (2) violation of 42 U.S.C. § 1983 for infringing Linder's First Amendment freedom of speech, and (3) violation of 42 U.S.C. § 1983 for infringing Linder's Fourteenth Amendment due process rights. The motion is fully briefed. ECF Nos. 50

1 ("Opp'n"); 52 ("Reply"). Pursuant to Civil Local Rule 7-1(b), the
2 Court finds this matter appropriate for disposition without oral
3 argument. For the reasons set forth below, Defendants' motion is
4 GRANTED. Some of Plaintiff's claims are DISMISSED WITH PREJUDICE,
5 while others are DISMISSED WITH LEAVE TO AMEND, as specified below.

6 **II. BACKGROUND**

7 At the motion to dismiss stage, the Court assumes the truth of
8 Plaintiff's well-pleaded factual allegations, so these facts come
9 from Plaintiff's First Amended Complaint ("FAC"). ECF No. 45.

10 Linder was employed by the District in various roles for 21
11 years. At the relevant times he served as a Bridge Lieutenant, and
12 from 2004 to 2012 he was also the Assistant Rangemaster and (later)
13 Rangemaster. As Assistant Rangemaster and Rangemaster, he was
14 responsible for firearms training and certification for District
15 employees. In January or February of 2012, Golden Gate removed
16 Linder as Rangemaster as a result of complaints made by Operating
17 Engineers Local 3 concerning the District's firearms certification
18 processes.

19 Several months later, Locati told Linder he would be
20 interviewed by an outside investigator who was looking into
21 complaints concerning the District's compliance with regulations
22 governing weapons permitting and licensing. That interview and
23 subsequent investigation by the California Bureau of Security and
24 Investigative Services ("the Bureau") and California Department of
25 Justice ("CDOJ") concluded that the District paid a retired former
26 employee to sign off on District firearms certifications without
27 knowledge of whether the individuals in question were actually

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1 qualified for certification. Over the course of that
2 investigation, Linder also revealed that Locati misrepresented the
3 retired former employee's date of retirement to conceal that the
4 District lacked an active Rangemaster (as is apparently required)
5 from March 2003 until 2004. This and other information provided by
6 Linder was a cause of the Bureau's decision to revoke permits
7 allowing the District to qualify and re-qualify its personnel to
8 carry firearms. As a result of the revocation of the District's
9 permits, the District was required to use private range services to
10 comply with firearm regulations.

11 On July 9, 2012, Linder was given a letter of intent to
12 terminate his employment by Locati and Bridge Manager Kary Witt
13 based on Linder's submission of two allegedly incorrect dates on
14 documents submitted to the Bureau. After that meeting, Linder was
15 escorted from the premises and told not to return, and he continued
16 on unpaid leave until September 2012, when his termination was
17 overturned. His return was mired by incidents of allegedly
18 retaliatory conduct by Locati, who assigned him to an unprecedented
19 and undesirable schedule, excessively scrutinized his conduct, and
20 placed unique conditions on his return. Linder filed a grievance
21 complaining about this alleged conduct; however, the District's
22 human resources department rejected the grievance and refused
23 Linder's parallel request for an investigation of allegations of
24 wrongdoing leveled by Locati.

25 On March 9, 2013, Linder responded to a car accident near the
26 Golden Gate Bridge, after which Locati accused him of wrongdoing
27 based on purported allegations from an unnamed California Highway

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1 Patrol (CHP) Officer. Linder asked Human Resources to investigate
2 the validity of the CHP claims against him, but Human Resources
3 rejected his grievance. In June 2013, Mr. Linder was placed on a
4 "Final Written Warning" based on three incidents (unspecified in
5 the complaint) that Linder argues are without merit. In September
6 2013, Mr. Linder received additional threats of termination
7 concerning alleged damage to vehicles with ergonomic
8 accommodations. In October 2013, Linder reported a security issue
9 to Locati. Two months later, Locati ordered Linder undergo a
10 "fitness for duty" examination. Despite being cleared to return to
11 duty, Linder was placed on administrative leave, and in late
12 December 2013, Locati initiated an "Intent to Terminate memorandum"
13 for Linder, citing various alleged instances of Linder's failure to
14 perform certain job duties.

15 On February 19, 2014, Linder was terminated. In terminating
16 Linder, the District cited four issues: (1) an incident with an
17 individual who attempted to climb a cable on the Golden Gate
18 Bridge, (2) a written warning regarding a complaint from the
19 California Highway Patrol about Linder's response to a car
20 accident, (3) Linder's response to a potential suicide, and (4)
21 Linder's allegedly aggressive behavior toward a trespassing jogger.
22 FAC ¶ 49.

23 Linder filed this suit alleging five claims against Locati and
24 the District. ECF No. 1 ("Compl."). Linder's FAC retains only
25 three of those claims: (1) retaliation in violation of California
26 Labor Code Section 1102.5(b), (2) violations of Linder's First
27 Amendment rights under 42 U.S.C. Section 1983, and (3) violations

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1 of Linder's Fourteenth Amendment due process rights under 42 U.S.C.
2 Section 1983.

3 This is Defendants' second motion to dismiss. The Court
4 granted Defendants' first motion and dismissed Linder's Section
5 1983 claims, in part, because Linder failed to allege facts
6 establishing (1) that he had a property interest in his job (ECF
7 No. 44 ("MTD Order") at 12-13); (2) that the District intended to
8 inhibit Linder's free speech (Id. at 14); and (3) that Locati was a
9 final policymaker or that a final policymaker ratified her actions
10 (Id. at 16). The Court dismissed Linder's retaliation claim under
11 California Labor Code Section 1102.5(b) because the Complaint
12 failed to identify any federal or state law, rule, or regulation
13 that the District violated. Id. at 17. Linder was granted leave
14 to amend, and filed his FAC on May 18, 2015.

15 **III. LEGAL STANDARD**

16 **A. Motion to Dismiss**

17 A motion to dismiss under Federal Rule of Civil Procedure
18 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
19 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
20 on the lack of a cognizable legal theory or the absence of
21 sufficient facts alleged under a cognizable legal theory."
22 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
23 1988). "When there are well-pleaded factual allegations, a court
24 should assume their veracity and then determine whether they
25 plausibly give rise to an entitlement to relief." Ashcroft v.
26 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
27 must accept as true all of the allegations contained in a complaint

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1 is inapplicable to legal conclusions. Threadbare recitals of the
2 elements of a cause of action, supported by mere conclusory
3 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
4 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
5 complaint must be both "sufficiently detailed to give fair notice
6 to the opposing party of the nature of the claim so that the party
7 may effectively defend against it" and "sufficiently plausible"
8 such that "it is not unfair to require the opposing party to be
9 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
10 1202, 1216 (9th Cir. 2011).

11 When granting a motion to dismiss, a court is generally
12 required to grant the plaintiff leave to amend. Cook, Perkiss &
13 Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47
14 (9th Cir. 1990). Leave to amend may be denied for undue delay, bad
15 faith, repeated failure to cure deficiencies by previous amendments
16 allowed, futility of the amendment, or prejudice. Foman v. Davis,
17 371 US 178, 182 (1962); Abagninin v. AMVAC Chem. Corp., 545 F3d
18 733, 742 (9th Cir. 2008). In determining whether amendment would
19 be futile, the court examines whether the complaint could be
20 amended to cure the defect requiring dismissal "without
21 contradicting any of the allegations of [the] original complaint."
22 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
23 To avoid dismissal after an opportunity to amend has been granted,
24 plaintiff must disclose the specific facts that would cure the
25 deficiency. "A plaintiff may not in substance say 'trust me,' and
26 thereby gain a license for further amendment when prior opportunity

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1 to amend has been given." Salameh v. Tarsadia Hotel, 726 F3d 1124,
2 1133 (9th Cir. 2013).

3 **IV. DISCUSSION**

4 Defendants move to dismiss each of Plaintiff's remaining three
5 claims: (1) retaliation in violation of California Labor Code
6 Section 1102.5(b), (2) violation of 42 U.S.C. § 1983 for infringing
7 Linder's First Amendment freedom of speech, and (3) violation of 42
8 U.S.C. § 1983 for infringing Linder's due process rights under the
9 Fourteenth Amendment. The Court addresses each in turn.

10 **A. Labor Code Section 1102.5(b)**

11 California Labor Code Section 1102.5(b) states that "[a]n
12 employer . . . shall not retaliate against an employee for
13 disclosing information . . . to a government or law enforcement
14 agency . . . if the employee has reasonable cause to believe that
15 the information discloses a violation of state or federal statute,
16 or a violation or noncompliance with a state or federal rule or
17 regulation." To state a claim under this section, Linder must show
18 (1) that he was terminated after reporting a violation of or
19 noncompliance with state or federal law, and (2) a causal
20 connection between the termination and reporting the violation.
21 Edgerly v. City of Oakland, 211 Cal. App. 4th 1191, 1199 (Cal. Ct.
22 App. 2012). Defendants argue that Linder has failed to establish a
23 causal connection.

24 Plaintiff's FAC alleges that "[b]oth Defendant Locati and Mr.
25 Witt were aware of Plaintiff's protected speech . . . after July 9,
26 2012" FAC ¶ 108. Defendants argue that Plaintiff's
27 allegation fails to establish causation because

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[a]s pleaded, the FAC only suggests the Defendants became aware of the allegedly protected speech at some point between July 9, 2012 and today. Without more specificity, Plaintiff fails to allege that the District was aware of the content of the allegedly protected speech before it took any adverse employment actions.

Mot. at 7-8. Linder does not address this point at all in his opposition brief. As a result, the Court need not address the issue. See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (quotation omitted)("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue."). Defendants' motion to dismiss Linder's California Labor Code claim for retaliation is GRANTED WITHOUT PREJUDICE. Leave to amend is GRANTED to address the issue of causation.

B. Section 1983 Claims

To state a claim under Section 1983, Linder must show that "an individual acting under the color of state law deprived him of a right, privilege, or immunity protected by the United States Constitution or federal law." Levine v. City of Alameda, 525 F.3d 903, 905 (9th Cir. 2008) (citing Lopez v. Dep't of Health Servs., 939 F.2d 881, 883 (9th Cir. 1991)). Linder alleges that both Locati and the District, acting under color of state law, deprived him of his Fourteenth Amendment due process rights and his First Amendment free speech rights.

1. First Amendment

"It is well settled that the state may not abuse its position as employer to stifle 'the First Amendment rights its employees would otherwise enjoy as citizens to comment on matters of public

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1 interest.'" Dahlia v. Rodriguez, 735 F.3d 1060, 1066 (9th Cir.
2 2013) (quoting Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009))
3 (internal alteration omitted). In First Amendment cases involving
4 public employees, the Court must seek "a balance between the
5 interests of the [employee], as a citizen, in commenting on matters
6 of public concern and the interest of the State, as an employer, in
7 promoting the efficiency of the public services it performs through
8 its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568
9 (1968). This balancing test has been refined into five steps
10 querying:

11 (1) whether the plaintiff spoke on a matter of public
12 concern; (2) whether the plaintiff spoke as a private
13 citizen or public employee; (3) whether the plaintiff's
14 protected speech was a substantial or motivating factor
15 in the adverse employment action; (4) whether the state
had an adequate justification for treating the employee
differently from other members of the general public; and
(5) whether the state would have taken the adverse
employment action even absent the protected speech.

16 Eng, 552 F.3d at 1070. Failure to meet any one of these steps is
17 fatal to a plaintiff's case. See Dahlia, 735 F.3d at 1067 n.4.

18 Defendants argue that because they did not intend to inhibit
19 Linder's free speech, his claim must be dismissed. See
20 Mendocino Envt'l Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301 (9th
21 Cir. 1999) (holding that intent to inhibit speech "is an element of
22 the claim"). More concretely, Defendants point to Linder's
23 allegations that Locati and the District directed him to speak with
24 investigators as evidence that they lacked intent to chill Linder's
25 speech. Defendants made the same argument in their first motion to
26 dismiss, and the Court dismissed Plaintiff's claim because Linder
27 failed to respond to Defendants' argument. MTD Order at 14-15.

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1 Plaintiff's opposition once again fails to address Defendants'
2 argument. "[F]ailure to respond in an opposition brief to an
3 argument put forward in an opening brief constitutes waiver or
4 abandonment" Stichting Pensioenfonds ABP, 802 F. Supp. at
5 1132. Because this is the second time that Plaintiff has failed to
6 respond, the Court concludes that further opportunities to amend
7 would be futile. Accordingly, Plaintiff's First Amendment
8 retaliation claim is DISMISSED WITH PREJUDICE.

9 **2. Fourteenth Amendment**

10 Due process claims are analyzed in two steps. See Walls v.
11 Cent. Contra Costa Transit Auth., 653 F.3d 963, 967-68 (9th Cir.
12 2011). First, the Court must determine whether Linder had a
13 property interest in continued employment. See id. at 968.
14 Second, and only if the Court determines that Linder did, in fact,
15 have a "property interest" in continued employment does the Court
16 determine whether Linder received all the process he was due. See
17 id. State law defines the property interests subject to federal
18 due process protections. See Brady v. Gebbie, 859 F.2d 1543, 1547-
19 48 (9th Cir. 1988).

20 Linder has not adequately alleged a property interest in
21 continued employment. Under California law, public employees that
22 are employed at-will do not have property interests in continued
23 employment. See Binkley v. Long Beach, 16 Cal. App. 4th 1795, 1808
24 (Cal. Ct. App. 1993); see also Kaye v. Bd. of Trs. of the San Diego
25 Cnty. Law Library, No. 07-cv-921 WQH (WMC), 2008 U.S. Dist. LEXIS
26 45604, at *12 (S.D. Cal. June 10, 2008). As Defendants point out,
27 the District's enabling legislation provides for "employ[ment] and
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1 discharge at pleasure [of] all subordinate officers, employees and
2 assistants." Cal. Sts. & Hwy. Code § 27151. The phrase "at
3 pleasure" "means one is an at-will employee who can be fired
4 without cause." Hill v. City of Long Beach, 33 Cal. App. 4th 1684,
5 1694 (Cal. Ct. App. 1996) (citing Bogacki v. Bd. of Supervisors, 5
6 Cal. 3d 771, 783 (Cal. 1971)).

7 Plaintiff relies on McGraw v. City of Huntington Beach, 882
8 F.2d 384, 389 (9th Cir. 1989) to claim that he gained a property
9 interest in continued employment the moment he was removed from
10 probationary status. McGraw does not stand for that proposition.
11 The McGraw court held that the plaintiff had a property interest in
12 her job because her employer's Personnel Rules "severely
13 restricted" the employer's ability to fire her. McGraw, 882 F.2d
14 at 389. Specifically, the Personnel Rules required that a
15 disciplinary dismissal "could have been accomplished only upon a
16 finding of 'just cause.'" Id. Linder does not cite to any rules
17 restricting the District's ability to terminate him. As a result,
18 McGraw is inapposite.

19 This is the second time that Plaintiff has failed to plead
20 facts establishing that he is not an at-will employee. See MTD
21 Order at 13. The Court concludes that further opportunities to
22 amend would be futile. Accordingly, Plaintiff's Fourteenth
23 Amendment claim is DISMISSED WITH PREJUDICE.

24 **V. CONCLUSION**

25 For the reasons set forth above, Defendants' motion to dismiss
26 is GRANTED, and the First Amended Complaint is DISMISSED WITHOUT
27 PREJUDICE. Leave to amend is GRANTED only as to Plaintiff's

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1 retaliation claim under California Labor Code Section 1102.5(b).
2 Plaintiff may file a second amended complaint within thirty (30)
3 days. Failure to file a second amended complaint within the time
4 allotted may result in dismissal with prejudice.

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6 IT IS SO ORDERED.

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8 Dated: August 3, 2015



9 UNITED STATES DISTRICT JUDGE
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